Practical Issues Arising in U.S., Foreign Arbitration

Arbitration counts as foreign tribunal for purposes of discovery aid, court rules; clause errors addressed.

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Four times in the past 15 months the U.S. Supreme Court has struck down lower court attempts to limit the impact of the Federal Arbitration Act by allowing recourse to the courts—on three of those occasions issuing per curiam orders vacating state court decisions for ignoring Supreme Court precedent. In light of the court's expansive interpretation of the FAA, I elsewhere urge rulemakers to take the court up on its invitation to create a mechanism for meaningful judicial review of arbitral awards. See Gregory P. Joseph, "We Need to Do Something about Arbitration," 39 Litigation No. 3 at 9 (summer 2013). This article addresses some practical issues under the FAA as it currently applies both to international and domestic arbitration. It begins, however, with an important decision construing 28 U.S.C. 1782.

• *Discovery in aid of arbitration abroad.* Section 1782 authorizes the district court

THE PRACTICE
Commentary and advice on developments in the law

to order any person who "resides or is found" in the district to give testimony or produce evidence "for use in a proceeding in a foreign or international tribunal." Prior to the Supreme Court's decision in *Intel Corp. v. Advanced Micro Devices*, 542 U.S. 241 (2004), a foreign arbitral tribunal was not deemed to be a "tribunal" within the meaning of the statute. In the first post-*Intel* circuit-level decision to address the question, the U.S. Court of Appeals for Eleventh Circuit held in *Application of Consorcio Ecuatoriano de Telecomunicaciones S.A.*, 685 F.3d 987 (11th Cir. 2012), that *Intel*'s emphasis on the breadth of the term "tribunal"—and the fact that this term was substituted in 1964 for the phrase "judicial proceeding"—led to the conclusion that the foreign arbitration before it fell within the scope of § 1782.

The relevant criteria, under the Eleventh Circuit's reading of *Intel*, are whether the arbitral panel acts as a first-instance adjudicative decision-maker, permits the gathering and submission of evidence and has the authority to determine liability and impose penalties, and whether its decision is subject to judicial review. Few arbitrations will fail these criteria. Even the absence of any appeal rights did not preclude a finding in *Consorcio* that the proceeding was "subject to judicial review" because the award was "subject to nullification based on procedural defects in the arbitration proceeding and to constitutional attack if the constitutional rights of one of the parties has been violated."

• *Breakdown of the arbitration clause. Murphy's Law applies in arbitration, too.* The international arbitration agreement in *Control Screening LLC v. Technological Applic'n & Prod. Co.*, 687 F.3d 163 (3d Cir. 2012), provided that "disputes shall be settled at International Arbitration Center of European countries for claim in the suing party's country under the rule of the Center." Regrettably, that body does not exist. While the parties agreed that their dispute was to be arbitrated, they disagreed as to where. The Third Circuit concluded that, when an international arbitration agreement designates a nonexistent forum, the New York Convention and the FAA mandate that the district court compel arbitration in its district, pursuant to 9 U.S.C. 4. This decision highlights the critical importance for U.S. parties of being the first movant to compel.

ARBITRATOR-SELECTION BREAKDOWN

The problem in *BP Exploration Libya Ltd. v. ExxonMobil Libya Ltd.*, 689 F.3d 481 (5th Cir. 2012), was described as a "mechanical breakdown" in the arbitrator selection process. The arbitration clause in an assignment agreement between BP and Exxon contained the typical provision that, in the event of a dispute, each of them would select one arbitrator, and those two would choose the third. But an earlier contract between Exxon and an offshore driller (a contract that was assigned to BP under the assignment agreement) incorporated rules providing that "each party shall appoint one arbitrator," and those two would select the third.

When the driller filed for arbitration against both Exxon and BP under the latter contract, contending that someone owed its fees, the arbitrator selection process appeared unworkable for a dispute among three of them. If "each party" picked an arbitrator, there would be no neutral. The Fifth Circuit held in *BP* that this constituted "a lapse in the naming of an arbitrator" within 9 U.S.C. 5. The district court had ordered arbitration before five arbitrators (three party-appointed, two neutral), but the Fifth Circuit held this quite practical solution foreclosed by the three-arbitrator mandate of the arbitration clause. The upshot: The driller retains its right to designate one arbitrator; BP and Exxon must agree on a second, failing which the district court will appoint one in accordance with § 5; and the two arbitrators must agree on the third, failing which, again, it falls to the district court to do so pursuant to § 5. This decision highlights the importance in some instances on being first to file an arbitration.

A not dissimilar problem arose in *Khan v. Dell Inc.*, 669 F.3d 350 (3d Cir. 2012), a domestic consumer arbitration. The arbitration clause provided that any dispute was to be arbitrated before the National Arbitration Forum. But when the plaintiff consumer filed his class action, the NAF was barred by a consent judgment from conducting consumer arbitrations. *Khan* considered whether this, too, was a § 5 "lapse" because the designated arbitrator (NAF) was unavailable. It held that whether § 5 applies depends on "whether the designation of the arbitrator was 'integral' to the arbitration provision or was merely an ancillary consideration." In a 2-1 decision, the Third Circuit in *Khan* declared that, to avoid judicial selection of an arbitrator under § 5, "the parties must have unambiguously expressed their intent not to arbitrate their disputes in the event that the designated arbitral forum is unavailable." The majority found no such unambiguous expression of intent.

TWO RULINGS ON PARTIALITY

• *Evident partiality.* The four statutory grounds for overturning an arbitral award set forth in 9 U.S.C. 10(a) apply both to domestic and international arbitrations. *Scandinavian Reins. Co. v. St. Paul F&M Ins. Co.*, 668 F.3d 60 (2d Cir. 2012). One of the four is "evident partiality or corruption in the arbitrators." § 10(a)(2).

Both the Second and Third circuits have issued opinions this year emphasizing that an arbitrator is evidently partial "only when a reasonable person, considering all of the circumstances, would have to conclude that an arbitrator was partial to one side." *NGC Network Asia LLC v. PAC Pac. Group Int'l Inc.*, 2013 U.S. App. Lexis 2802 (2d Cir. February 11, 2013). "The conclusion of bias must be ineluctable, the favorable treatment unilateral." *Freeman v. Pittsburgh Glass Works*, 709 F.3d 240 (3d Cir. 2013).

• *Arbitrating with nonsignatories.* Although "[a]rbitration is a matter of contract," *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), there are circumstances in which a nonsignatory may compel arbitration or be compelled to arbitrate.

The Ninth Circuit ruled in January that, when the party moving to compel is a nonsignatory, it is for the court, not the arbitrator, to decide arbitrability—even if the arbitration clause provides that this is a question for the arbitrator—because the nonsignatory did not sign on to the arbitration clause. *Kramer v. Toyota Motor Corp.*, 705 F.3d 1122 (9th Cir. 2013). This reasoning would appear to apply a fortiori if the party against whom the motion to compel is brought is a nonsignatory.

One of the common grounds nonsignatories assert in motions to compel is the doctrine of equitable estoppel. Equitable estoppel may apply if a signatory alleges concerted misconduct by the nonsignatory and a signatory, and the misconduct is intimately connected with the contract. *Kramer*, 705 F.3d at 1129. The relationship between the allegations to be arbitrated and the contract is critical. A mere allegation of conspiracy between the nonsignatory and a signatory is insufficient—the claim must be intertwined with the contract containing the arbitration clause. *King Cole Foods Inc. v. SuperValu Inc.*, 707 F.3d 917 (8th Cir. 2013). Accord *Baldwin v. Cavett*, 2012 U.S. App. Lexis 22777, at *17-*18 (5th Cir. November 6, 2012).

Agency is another commonly invoked ground for compelling arbitration with a nonsignatory. The Fifth Circuit ruled last fall that a nonsignatory may not compel arbitration merely because it is an agent of a signatory, even if the arbitration clause expressly extends to agents, unless the claim itself arises out of (i) the agency relationship (*Baldwin*, 2012 U.S. App. Lexis 22777, at *12), and (ii) an obligation created by the contract. *Weingarten Realty Investors v. Miller*, 495 Fed. App'x 418 (5th Cir. 2012).

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